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BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION ) FINAL ORDER  
WATER RIGHT NO. G113493-41N BY )  
EAGLE CREEK COLONY )

\* \* \* \* \*

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. Timely exceptions were received from Applicant Eagle Creek Colony and from Objector Errol Fritz Farm and Ranch Company. For the reasons stated below, and after having given the objections full consideration, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the February 11, 1987 Proposal for Decision in this matter, and incorporates them herein by reference.

RESPONSE TO EXCEPTIONS

The Applicant has filed exceptions to the requirement, imposed in the Proposed Order (Paragraphs F, G, and H), that the Applicant install measuring devices. The Applicant takes the position that the record shows that the Objectors are not receiving water which spills at Blair Reservoir. (See Objection to Proposed Decision, filed by Applicant on February 27, 1987, pp. 1-2.)

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The record in this matter does indeed indicate that the Objectors normally do not use, or depend on, water spilled at Blair Reservoir, as a result of the fact that water does not usually make it past Blair Reservoir. (See Findings of Fact 15, 19.) However, when above-normal flows do occur, Blair Reservoir spills and the water increments the flow of Eagle Creek. (See Findings of Fact 12, 19.) The Objectors have indicated that they use whatever water is available in Eagle Creek (see Findings of Fact 16, 17), and the records show that the likely times of spills at Blair--during spring runoff and other periods of high runoff, such as following a storm--coincide with the periods of appropriation claimed for some of the Objectors' uses. (See Statements of Claim accompanying Objections.) Therefore, it is very possible that whatever water is spilled at Blair Reservoir is used by the Objectors for stockwater, irrigation, or to fill their own reservoir rights.

There is a chance that the water spilled at Blair is not used by any of the downstream appropriators, either because it does not reach them or because spills may occur only during high flow regimens when there is sufficient or excess water in Eagle Creek along its entire length. However, as discussed in the Proposal for Decision in this matter, the Applicant did not raise this issue nor present evidence or testimony showing that either hypothesis is likely. (See Conclusion of Law 8.) Therefore, the Applicant has failed in its burden of persuasion in this matter, and the flow measurement conditions must be retained, in order to prevent possible adverse effects to the water rights of the Objectors.

The Applicant also excepts to Conditions G and H of the Proposed Order, on the basis that, if measuring devices are to be required, the Applicant "should not be limited at this time to any particular means or method of measurement." (Applicant's Objection to Proposed Decision, page 2.) The Applicant suggests that it be allowed to utilize "the most efficient and appropriate means of measurement", based on engineering studies conducted by SCS or by a competent professional engineering firm.

The Proposed Order already authorizes the Applicant to choose its means of measurement. Nothing in the Proposed Order prevents the Applicant from installing means of measurement which differ from the suggested alternative, as long as the means chosen is adequate to take the required measurements: Condition H states that the Applicant must measure by using "a Parshall Flume or other SCS-approved measuring device, or by installing and maintaining a staff gage . . . ." (Emphasis added.)

There also is no reason to revise proposed Condition G, since the Condition specifies the measurements which must be taken (which requirement the Department asserts must be imposed, since the Applicant did not carry its burden of persuasion on the issue of adverse effect in regard to water which would be available to the Objectors under the present conditions), but does not impose any particular means of measurement.

In summary, the Applicant's exceptions do not provide sufficient basis for amending the Proposal for Decision.

The Applicant also refers to proposed Permit Condition C in its Objection, asking that the Applicant be able to block the present diversion ditch "at a point immediately below the farm

buildings of Errol Fritz Ranch", if the headgate is to be left in place, so that water is not lost to Eagle Creek. (Applicant's Objection to Proposed Decision, page 3.) The Applicant avers that this action will provide Mr. Fritz with flood control while allowing water in the ditch to return to Eagle Creek.

Objector Errol Fritz responded to the Proposal for Decision, as well, with a discussion of whether the headgate structure should remain in place. Mr. Fritz asks that the headgate structure be left in place to provide flood control. Mr. Fritz also plans to "leave the portion of the old diversion ditch that crosses his property in place", to collect snow for stockwatering and natural irrigation.

The two requests do not appear to be contradictory with one another or with the Proposed Order. If the Applicant can provide Mr. Fritz with flood control by leaving the headgate in place but blocking the diversion ditch, Mr. Fritz's concerns are met. What he does with the diversion ditch below the blockage is not relevant to this matter, since the record indicates that water will not be lost to Eagle Creek. In addition, the water from Eagle Creek will not be diverted to the loss of the stream if the diversion ditch is blocked off. (If, however, the proposed blocking does not prevent Eagle Creek water from being lost, either because the water will not return to Eagle Creek or because the blockage is not a sufficient means to prevent water from flowing down the ditch, the Applicant must remove the headgate to be in compliance with the Change Authorization; the Objector will have to provide his own means of flood control.)

The proposed Condition allows the Applicant to take its suggested action, or any other action which the Applicant and Mr. Fritz may wish to agree upon, as long as the end result is that no water is lost to Eagle Creek through the headgate structure and diversion ditch. Therefore, proposed Condition C will be allowed to remain as stated in the February 11, 1987 Proposal for Decision in this matter.

Based upon the Findings of Fact and Conclusions of Law, and all files and records herein, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right No. G113493-41N is hereby granted to Eagle Creek Colony to change the point of diversion, place of storage, and means of diversion for Claimed Water Right Nos. W113493-41N, W113496-41N, W113497-41N, W113498-41N, W113499-41N, W113500-41N, W113501-41N, W113502-41N, W113503-41N, W113505-41N, W113508-41N, W113509-41N, and W113510-41N for a total of 77.02 cfs up to 1,815 acre-feet of water per year, to be used by the Applicant for flood irrigation. The place of use for Claimed Water Right No. W113493-41N, for stockwater, also will be changed from Section 11 to Section 16 of Township 34 North, Range 04 East. All legal descriptions in this matter are located in Liberty County, Montana.

The specific changes which are authorized by grant of this Application are as follows:

The Applicant is authorized to abandon its headgate structure and point of diversion in Section 9, Township 35 North, Range 04 East, and to instead collect water in an onstream reservoir located in the N $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 16, Township 34 North, Range 04 East. The Applicant will abandon its diversion ditch leading from the past point of diversion to Bourne-Hamilton Reservoir, located in Section 11, Township 34 North, Range 04 East, and abandon its right to store water in Bourne-Hamilton Reservoir.

The Applicant is authorized to enlarge its onstream Reservoir, known as Blair Reservoir or Blair Dam, to a total capacity of 207 acre-feet. In addition, the Applicant is authorized to maintain a 5 acre-foot reservoir in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 16, Township 34 North, Range 04 East. This Change Authorization in no event authorizes the Applicant to divert water at a greater rate than 77.02 cfs, or to conjunctively store and use more than 1815.00 ac/ft. of water per year.

This Authorization to Change is issued subject to the following express terms, conditions, restrictions, and limitations:

A. The Applicant's claimed water rights, and the changes authorized herein in the use of such rights, are subject to all prior and existing rights and to any final determinations of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Applicant to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Applicant's liability for damages caused by exercise of this Authorization, nor does the Department, in issuing this Authorization, acknowledge any liability for damages caused by the exercise of this Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. The Applicant may leave the headgate structure located in Section 9, Township 35 North, Range 04 East in place until a determination has been made concerning whether or not the structure is useful in Eagle Creek flood control, but the flashboards must be removed and the diversion otherwise rendered inoperable for purposes of allowing water into the ditch. If a determination is made that the structure is resulting in water being diverted into the ditch, the Applicant must remove the headgate structure by the completion date granted for completion of the Applicant's change.

D. The Applicant shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Applicant's claimed uses.

E. The dam structure, spillways and other necessary appurtenances, and all construction necessary to accomplish the installation and maintenance of the Applicant's storage facility shall be in accordance with Soil Conservation Service plans and specifications, or plans and specifications prepared by a qualified professional engineer and approved by any necessary authorizing agency.

F. The Applicant shall include an outlet in the dam structure at the water level which corresponds to 80 ac/ft. of storage, as determined by topographic studies of the dam site. The outlet shall be designed to allow the Applicant to adjust the amount of water going through the dam, and to measure such pass-through amount.

G. The additional on-stream storage authorized by the present Change procedure must be captured at a flow rate which does not exceed the historical diversion rate. Therefore, once 80 acre-feet of storage has been achieved, the Applicant may not divert at a flow rate greater than the sum of 20 cfs plus the amount of water concurrently being withdrawn from the reservoir for irrigation, or 77.02 cfs, whichever flow rate is less. To achieve this situation, the Applicant must keep track of the streamflow entering the reservoir and the flow rate of water diverted from the reservoir. Whenever the incoming flow exceeds the irrigation flow by more than 20 cfs, the flow in excess of 20 cfs must be released through the dam for use by downstream appropriators.

H. In order to ensure accurate flow measurements, the Applicant must measure the flow of Eagle Creek above Blair Reservoir by using a Parshall flume or other SCS-approved measuring device, or by installing and maintaining a staff gage in accordance with the instructions listed in Addendum A to this Final Order.

I. The Applicant shall keep flow measurement records, and submit them to the Department of Natural Resources and Conservation's Havre Field Office, yearly by November 30, or upon request.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 23 day of March, 1987.

Gary Fritz  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6605

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6612

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Addendum A to Authorization to Change Appropriation Water  
Right No. 113493-41N

1. Staff gage shall be set in Eagle Creek in a straight, uniform reach (section) of the channel above Blair Reservoir (T34N, R3E, Section 9). The staff gage shall be graduated in feet, tenths of feet and hundredths of feet. The gage shall be placed so that it is accessible as is practicable.  
The Department shall be notified of any movement, replacement, or adjustment of the staff gage. Notification shall include the date and type of modification, and the new location of the staff gage in relation to the bench mark.
2. A permanent bench mark shall be placed near the staff gage, but out of the way of floods, headgates, or roads so that the bench mark will not be disturbed. The level of the staff gage shall be referenced to the bench mark at least once per year or at any time when the staff gage is moved or disturbed.
3. The stream discharge (flow measurement) shall be measured by an adequate measuring device (current meter, weir, Parshall flume, or broad crested weir) at least four (4) times per year. One of the measurements shall be made as near to the peak discharge as is practical. The lowest measured discharge shall be less than one-quarter ( $\frac{1}{4}$ ) of the highest measured discharge. To the extent possible, the additional measured discharges shall be taken at equal intervals between the highest and lowest discharge. The staff gage reading shall be recorded whenever stream flow measurement is made.
4. Staff gage readings shall be made weekly throughout the irrigation season. The gage readings, along with the date and time of reading, shall be recorded.
5. The following documents covering flow and staff gage readings and placement for the previous April 1 to October 4 period shall be submitted to the Department by November 30 of each year.
  - A. The staff gage readings to the nearest hundredth of a foot, and the date the reading was made.
  - B. The field notes from the discharge measurements, including any worksheets or calculation forms. The field notes should include at least the following:
    - (1) The method of measurement.
    - (2) The location where the measurement was made.
    - (3) The flow rate measured.
    - (4) The time and date of the measurement.
    - (5) The staff gage measurement at the time of measurement.

The Applicant may obtain help in the placement or reading of the staff gage, methods of measuring flows, and record keeping, from the Department of Natural Resources and Conservation, Havre Field Office, or the Soil Conservation Service.

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AFFIDAVIT OF SERVICE  
MAILING

STATE OF MONTANA )  
 ) ss.  
County of Lewis & Clark )

Donna Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 23, 1987, she deposited in the United States mail, first class postage prepaid, a FINAL ORDER by the Department on the Application for Change of Appropriation Water Right No. G113493 by Eagle Creek Colony, addressed to each of the following persons or agencies:

Eagle Creek Colony  
Rural Route  
Galata, MT 59444

Gregory J. Hatley, Attorney  
P.O. Box 2103  
Great Falls, MT 59403

Rae V. Kalbfleisch  
Nelson & Kalbfleisch  
P.O. Box 518  
Shelby, MT 59474-0518

Gummer Farms, Inc.  
Box 524  
Chester, MT 59522

Nellie Diemert  
Clark E. Diemert Estate  
1712 Alder Dr.  
Great Falls, MT 59474

Leonard Fritz  
Box N  
Chester, MT 59522

Hugh B. Brown, Attorney  
P.O. Box C  
Chester, MT 59522

Errol Fritz, Pres.  
Errol Fritz Farm & Ranch Co.  
Box N  
Chester, MT 59522

Gerald Fenger Farms, Inc.  
R.R. Box 7  
Galata, MT 59444

Raymond & Lillian D. Fritz  
Box 280  
Chester, MT 59522

Violett Farms, Inc.  
Box 104  
Lothair, MT 59461

Mary E. & John R. Fritz  
Box 280  
Chester, MT 59522

Pioneer Farms, Inc.  
P.O. Box 187  
Chester, MT 59522

Bob Larson  
Water Rights Bureau  
Field Office Manager  
Havre, MT  
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

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STATE OF MONTANA )  
 ) ss.  
County of Lewis & Clark )

On this 23<sup>rd</sup> day of March, 1987, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

  
\_\_\_\_\_  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-21-1990

**CASE # 113493**

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION ) PROPOSAL FOR DECISION  
WATER RIGHT NO. G113493-41N BY )  
EAGLE CREEK COLONY )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 30, 1986, in Chester, Montana.

Eagle Creek Colony, the Applicant in this matter, was represented by Counsel Gregory J. Hatley, and by Colony member David Hofer.

Wayne Otto, consulting agriculture engineer, appeared as a witness for the Applicant.

Objector Nellie Diemert appeared personally.

Objectors Pioneer Farms, Inc., Gerald Fenger Farms, Inc., and Violet Farms, Inc., appeared by and through counsel Hugh B. Brown.

Objector Gummer Farms, Inc. appeared by and through Tom Gummer.

Objector Leonard Fritz appeared by and through his wife.

Objectors Raymond and Lillian Fritz appeared by and through Lillian Fritz.

Objector Errol Fritz appeared personally.

Ben J. Oswood, predecessor in interest to Errol Fritz, appeared as a witness for Errol Fritz.

Objectors Mary and John Fritz were represented at the hearing by Lillian Fritz, mother of John Fritz, and by Mrs. Leonard Fritz.

Bob Larson, Field Manager of the Havre Water Rights Bureau Field Office, and Marvin Cross, Engineering Analyst with the Havre Field Office, appeared as staff expert witnesses for the Department of Natural Resources and Conservation (hereafter, the "Department").

#### STATEMENT OF THE CASE

On May 31, 1985, the Applicant filed an Application for Change of Appropriation Water Right No. G113493, seeking to change the means and point of diversion and place of storage for claimed water right Nos. W113496, W113497, W113498, W113499, W113500, W113501, W113502, W113503, W113505, W113508, W113509, and W113510, all in Basin 41N. The diversion would be changed from a headgate located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 9, Township 35 North, Range 4 East, to an on-stream dam located in the N $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 16, Township 34 North, Range 4 East, all in Liberty County, Montana. The 132 ac/ft. storage facility into which water has been diverted would be abandoned, and the storage capacity would be added to that of the existing 80 ac/ft. reservoir located at the proposed point of diversion. The enlarged reservoir would have a storage capacity of 207 ac/ft. The place of use would remain the same.

The Application for Change additionally seeks to move stockwatering rights claimed in Claim No. W113493-41N from the present place of use in the E $\frac{1}{2}$ W $\frac{1}{2}$  and the W $\frac{1}{2}$ E $\frac{1}{2}$  of Section 11,

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Township 34 North, Range 4 East, Liberty County, Montana, to a new 5 ac/ft. reservoir in the NE¼NE¼SE¼ of Section 16, Township 34 North, Range 4 East, Liberty County, Montana.

The pertinent portions of the Application for Change were published in the Liberty County Times, a newspaper of general circulation in the area of the source, on September 26 and October 3, 1985.

Nine timely objections to the Application were filed. Pioneer Farms, Inc., Gerald Fenger Farms, Inc., and Violet Farms, Inc. objected to the Application on the basis that the volume of water is excessive and the requested reservoir capacity is too large, and that their downstream rights therefore could be adversely affected since the new reservoir would hold back water that now flows down Eagle Creek. Gerald Fenger Farms, Inc. also expressed concern that new storage on Eagle Creek could cause saline seep.

Objectors Mary and John Fritz, Raymond and Lillian Fritz, Leonard Fritz, and Errol Fritz Farm and Ranch Co. all allege that the proposed reservoir size is too large, and that water users downstream from the dam would not receive any water since the larger dam would capture the entire flow of Eagle Creek.<sup>1</sup> Raymond and Lillian Fritz additionally allege that they use water from Eagle Creek "whenever enough water comes down" the creek,

<sup>1</sup> The objections filed by Errol Fritz and Leonard Fritz refer to a figure of 1815 acre-feet as being the potential reservoir size. However, as the Remark section of the Public Notice in this matter discusses, the proposed storage capacity is 212 acre-feet. The 1815 acre-feet figure reflects the total volume of the Applicant's claimed water use rights. The Applicant does not intend to build a reservoir with this capacity. (See Findings of Fact, below.)

and Leonard Fritz's objection alleges that he depends upon Eagle Creek water for stockwater.

The objection filed by Gummer Farms, Inc. states that the Applicant's dam should be smaller, and water measurements should be required so that downstream water users receive their "fair share." The objections filed by John and Mary Fritz and Errol Fritz also suggest that some form of measuring the amount of water diverted by the Applicant be required.

The objection filed by Nellie Diemert alleges that she has water rights senior to water rights claimed by the Applicant, which will be adversely affected by the Applicant's proposed change, specifically a 1900 instream stockwatering use; that the Applicant has already prevented her from "obtaining sufficient water to meet her needs", and that the proposed change will prevent use of the Diemert grazing land adjoining Eagle Creek. The objection also alleges that her water right flow rates will be adversely affected if the Applicant diverts water at a faster rate than it previously has been diverted.

On December 23, 1985, a letter was sent to the Applicant by Laurence Siroky, Assistant Administrator of the Department's Water Resources Division. The letter informed the Applicant that Montana statutes require a review of the construction and operation of high hazard dams in Montana whose capacity is equal to or greater than 50 acre-feet. The letter specified the steps to be taken in order to gain authorization for such a structure, and stated that "the first step in the process is to determine if

the proposed dam is a high hazard dam. This is done by applying for a hazard classification to this Department." An application for hazard classification was enclosed with the letter.

Marvin Cross, Engineering Analyst with the Havre Water Rights Bureau Field Office, developed a field report on the Application for inclusion in the file in this matter. (February 4, 1986 Field Report.) A copy of the report was mailed to all parties of record.

The contested case hearing in this matter was completed on April 30, 1986, and the record was closed at the end of the hearing.

#### EXHIBITS

The Applicant offered two exhibits for inclusion in the record in this matter:

Applicant's Exhibit 1 consists of photocopies of all Statements of Claim for Existing Water Rights (SB76 Claims), and certified copies of the original Notices of Appropriation upon which the claims are based, for the water rights proposed to be changed under the present Application.

Applicant's Exhibit 2 is a map of the drainage areas surrounding the Applicant's and Objectors' points of diversion and places of use. The map was developed by assembling a mosaic of USGS quad maps.

Applicant's Exhibits 1 and 2 were accepted for the record without objection.

The Objectors did not submit any exhibits in support of their objections to the Application in this matter.

The Department did not submit any exhibits for inclusion in the record in this matter. The Department file in this matter, including the February 4, 1986 Field Report prepared by Marvin Cross, was made part of the record in this matter without objection, after review by all parties at the hearing.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. Application for Change of Appropriation Water Right No. G113493-41N was duly filed with the Department of Natural Resources and Conservation on May 31, 1985, at 1:35 p.m.

3. The pertinent portions of the Application were published in the Liberty County Times, a newspaper of general circulation in the area of the source, on September 26 and October 3, 1985.

4. The source of water for the claimed water use rights proposed to be changed is surface water from Eagle Creek, in Liberty County, Montana. Eagle Creek is a non-perennial stream. See Water Resources Survey, Liberty and Toole Counties, Montana (June, 1969), plates 12 and 15.

Department records indicate that several Statements of Claim for Existing Rights have been filed on Eagle Creek, but that no permits have been issued or water reserved for any planned uses or developments.

5. The use of the water rights in question has been made by diverting water from Eagle Creek at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 9, Township 35 North, Range 4 East, running the water one-half to three-quarters of a mile through a ditch to Little Horse Creek, leaving the water in Little Horse Creek until the creek reaches its closest point to Bourne-Hamilton Reservoir (in Section 11, Township 34 North, Range 4 East), then diverting the water into Bourne-Hamilton Reservoir by means of a ditch. Water has then been moved as needed through a series of ditches to Blair Reservoir, an 80 acre-foot capacity on-stream reservoir in the SE $\frac{1}{4}$  of Section 9 and the NE $\frac{1}{4}$  of Section 16, Township 34 North, Range 4 East. (Testimony of David Hofer; February 4, 1986 Field Report.)

6. "In the past, once the Blair Reservoir was filled, the flow rate diverted was limited by the capacity of the Bourne-Hamilton Diversion Ditch." (February 4, 1986 Field Report, page 2.) Engineering Analyst Marvin Cross calculated the ditch capacity of the diversion ditch to be a minimum of 16.2 cubic feet per second ("cfs"), using Manning's Equation; 20 cfs original capacity, if a flow reduction caused by siltation and ditch deterioration is taken into account. (Testimony of Marvin Cross; February 4, 1986 Field Report, page 3.)

There is no evidence as to the pattern of diversion into Bourne-Hamilton in recent years. David Hofer testified that the Applicant has attempted to divert water into Bourne-Hamilton Reservoir for use two times since the Colony purchased the property in 1980; that one time water did not reach the Reservoir, and one time water reached Bourne-Hamilton Reservoir but there was not enough water to further transfer it to Blair Reservoir because of the losses incurred in the ditches.

The affidavits which are signed by Jesse Blair, predecessor in interest to the Applicant, and which accompany the Applicant's SB76 Claims, state that the ditch running between Eagle Creek and Little Horse Creek (which diverted water for Bourne-Hamilton Reservoir) was in "continuous and uninterrupted use" for the purpose of supplying irrigation water since Mr. Blair's purchase of the property in 1917. (See Affidavits accompanying Statements of Claim for Existing Water Rights, Applicant's Exhibit 1.)

7. Under the Applicant's proposed change, the waters which have been diverted to Bourne-Hamilton Reservoir would be left in Eagle Creek to flow downstream to the on-stream Blair Reservoir. Bourne-Hamilton Reservoir would not be used for any purpose under the proposed change. (Testimony of David Hofer.)

The dam structure at Blair Reservoir would be built approximately 2.8 feet higher than the present structure to obtain additional storage of 127 acre-feet per year. (Estimate by Marvin Cross, based on topographic maps of the Blair Reservoir area.) The dikes (side wings of the dam) would be extended, and the dam structure would be equipped with an irrigation outlet which could release all waters, plus a 3-foot diameter spillway

at the present spillway level and an emergency spillway two to three feet higher than the existing spillway. (Testimony of David Hofer.)

The proposed dam design has been discussed with the Soil Conservation Service (testimony of David Hofer), and the proposed site has been investigated, using an SCS drill rig (testimony of Wayne Otto). Wayne Otto testified that he has looked at the proposed site, and believes the enlargement is feasible. In addition, the Applicant has been in contact with the Department concerning a determination of dam safety. (Testimony of David Hofer. See also December 23, 1985 letter to Applicant from Laurence Siroky, concerning hazard classification of the dam.)

8. The estimated storage capacity of Bourne-Hamilton Reservoir, the use of which the Applicant would abandon, is 132 acre-feet. (Testimony of David Hofer, Marvin Cross; February 4, 1986 Field Report, page 1.) Under the proposed changes, Blair Reservoir would be enlarged from a storage capacity of 80 acre-feet to a total storage capacity of 207 acre-feet, an increase of 127 acre-feet out of the 132 acre-feet Bourne-Hamilton capacity. The remaining 5 acre-feet of storage would be used for a stockwater impoundment to be located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 16, Township 34 North, Range 4 East. (Testimony of David Hofer; Application G113493-41N; February 4, 1986 Field Report.) No addition or reduction to the Applicant's present total storage capacity would be made. (Present storage capacity is 80 acre-feet in Blair + 132 acre-feet in Bourne-Hamilton, for a total of 212 acre-feet. The proposed

storage capacity is 207 acre-feet in Blair + 5 acre-feet in the stockwater impoundment, for a total of 212 acre-feet.)

9. The 5 acre-feet stock pond (referred to on the Application form and map as the "duck dam") already has been constructed. (Testimony of David Hofer, Marvin Cross.) Marvin Cross testified that he informed the Applicant at the time of the Application that the Colony would be able to build a stockwater impoundment of 15 acre-feet or less on a non-perennial stream without obtaining a permit or prior approval from the Department, by submitting a completion form within 60 days after construction of the impoundment (see MCA § 85-2-306(3)), but that the Applicant had retained the stockwater impoundment as part of the Application to give it the Application's priority date.

10. The Applicant uses the water rights in question for irrigation, garden, and stockwater purposes. These uses (and their places of use) will not change under the Applicant's proposed change in storage facilities. (Testimony of David Hofer.)

The claimed rights which the Applicant proposes to change list places of use in Sections 15, 16, 21, 22, 27, and 28, Township 34 North, Range 4 East. David Hofer testified that the land in Section 16 currently is not being irrigated, but did not discuss whether the Applicant intends to resume use of this acreage; he stated that the Applicant currently is irrigating approximately 120 acres of alfalfa and 10 acres of garden, partly by flood-irrigation and partly by wheel-line sprinkler.

11. The claimed water rights for which Application to Change has been made total 77.02 cfs up to 1,815 acre-feet of water per year.

David Hofer testified that the Applicant does not intend to store that amount of water, but wishes to store the present (212 acre-feet) volume of water. He stated that the Applicant would like to use carryover storage, if any water is left at the end of the irrigation season.

In response to questioning, David Hofer stated that the Applicant most likely will only use a single fill of the reservoirs, or whatever amount is needed to do a "decent job" of irrigating. Neither Mr. Hofer nor any of the other parties provided testimony or evidence concerning the historical pattern of storage for the Applicant's claimed water rights. However, the volumes which have been granted the Applicant in the preliminary adjudication decree (up to 1815 ac/ft. per year) would allow the Applicant to fill the reservoirs several times. (Department records.)

12. The drainage area above Blair Reservoir constitutes less than 20 percent of the total drainage area for Eagle Creek which is available to the Objectors. (Testimony of Wayne Otto.) Mr. Otto testified that he reviewed USGS maps, and determined that the majority of the geographic area which contributes drainage to Eagle Creek occurs below the Applicant's proposed storage at Blair Reservoir.

For example, Mr. Otto estimated that a total drainage area of 32,000 acres is available above Fenger Farms, the nearest Objector downstream, of which only 9,860 acres is located above

Blair Reservoir. With regard to Objectors located further downstream, Mr. Otto estimated that the drainage area contributing water to Eagle Creek which would be available to such Objectors as Pioneer Farms, the Diemerts, and Violet Farms to be as large as 42,000 acres, excluding the area above Blair Reservoir. (See Applicant's Exhibit 2.)

Mr. Hofer testified that he had telephoned Mary Fritz and Lillian Fritz in March (1986) when Blair Reservoir reached capacity, and that they said they already had a "lot of water", while a person upstream from Fenger Farms had told him that his reservoir was full at a time when Blair Reservoir had not yet overflowed. Mr. Otto stated that the fact that downstream water users were receiving water at times when Blair Reservoir was not spilling indicates that water is coming from sources other than the portion of Eagle Creek above Blair Reservoir; sources such as a large drainage area known as Antelope Coulee that drains into Eagle Creek below the reservoir.

13. According to Soil Conservation Service precipitation data for the area, the whole area receives about the same rainfall and moisture, with the Eagle Creek drainage area above Blair Reservoir receiving no more moisture proportionally than the area below the reservoir. Also, according to SCS precipitation data, winter precipitation accounts for only about 25 percent of the total average runoff. (Testimony of Wayne Otto.)

In response to questioning, Mr. Otto agreed that much of the drainage area above Blair Reservoir is steeper and at a higher

elevation than the area below, which possibly could lead to a different runoff pattern in regard to the amounts of moisture reaching Eagle Creek and the timing of the runoff.

14. Testimony indicates that the proposed change in storage would not result in the loss of water to Eagle Creek. The total surface area of water in storage would not increase (testimony of David Hofer), and might actually decrease (testimony of Marvin Cross). Although the surface area of Blair Reservoir would increase as a result of the greater storage capacity, the increase would not exceed the surface area of Bourne-Hamilton Reservoir, which no longer would be in use. Therefore, evaporative losses under the proposed plan can be expected not to exceed those incurred through the present storage system.

In addition, under the proposed change the water would be left in the natural channel of Eagle Creek, rather than being diverted through a series of ditches. This method of transportation may result in some water savings, since the distance the water would travel would be reduced by at least a mile (testimony of Wayne Otto, map included in February 4, 1986 Field Report), and since the natural channel likely loses less water than the ditch system. (Testimony of Wayne Otto.)

On the related issue of water quality, Mr. Otto testified that he has not seen any evidence of salinity resulting from Blair Reservoir.

15. No flow measurements were submitted for the record in this matter. The only information on patterns of water availability in Eagle Creek is contained in the allegations of the parties.

David Hofer testified that the runoff in March (1986) was at least as much as in a normal year, although the Applicant had experienced a series of dry years prior to the 1986 runoff.

Wayne Otto testified that water was present in Eagle Creek when he was on site in April, 1986, but that he has no personal knowledge of whether the creek flows year-round or what the flows measure. He testified that precipitation records indicate that the spring of 1986 probably was "above average" for moisture.

Lillian Fritz testified that there was water "across the road" in March (1986) when Mr. Hofer spoke to her, but that they do not have water "on the flats" by her home very often. Ben J. Oswood testified that he thinks the runoff flows in 1986 were a "flood" compared to the usual flows in the creek since 1960, while Errol Fritz characterized the 1986 spring runoff as "unusually high".

Marvin Cross testified that Eagle Creek is not considered a perennial stream by SCS standards; although "probably" there are portions of the stream that run all year, the largest reach of the stream dries up. Mr. Cross added that the years since 1981 have been very dry. He estimated that, in his opinion, Blair Reservoir and other reservoirs probably will not fill in most years.

16. Most of the Objectors in this matter expressed concern that the proposed enlargement of Blair Reservoir could collect waters which previously have been available for use by the downstream water users. (See Statement of the Case, February 4, 1986 Field Report, page 2 and Figure 1.)

Errol Fritz testified at the hearing that he thinks the Applicant's senior claimed water rights are based on high water, and do not reflect the normal flow of Eagle Creek. He testified that he does not object to the proposed change per se, since the Applicant is entitled to take its senior rights, but that he thinks the change may result in more water being collected and less water being in the creek; that no water will make it past Blair Reservoir except to the two water users with whom the Applicant has made an agreement to release water to fill those two users' reservoirs.

Lillian Fritz testified that she is concerned about the number of times the Applicant will fill Blair Reservoir, suggesting that water may never reach downstream users.

Hugh Brown stated that Pioneer Farms and Violet Farms have based their objections to the proposed change on adverse effects which would result to their water-spreading irrigation system (Claim No. 124757-41N) if the flow in Eagle Creek is decreased.

As the testimony and the written objections indicate, the Objectors in this matter believe that an enlargement of Blair Reservoir will capture the entire flow of Eagle Creek.

17. All of the Objectors have claimed water use rights on Eagle Creek for stock and/or irrigation uses. The objection filed by Raymond and Lillian Fritz alleges that they use water whenever "enough water" comes down the creek, while other objections refer to the SB76 Claim or make general reference to a period of use. However, none of the Objectors testified as to how much water they have been receiving, or what the pattern of

water availability in terms of time, duration, and location is for Eagle Creek.

18. Objector Errol Fritz expressed an additional concern with the proposed change, specifically with the Applicant's stated intent to abandon use of the present headgate and ditch which divert water from Eagle Creek into Little Horse Creek. He testified that he believes the Applicant should leave the headgate and ditch in place to prevent flooding. Mr. Oswood also stated that the diversion structure and ditch should be left intact to provide flood protection. He added that leaving the structures in place will also result in some water making it down the ditch even if the water isn't actually diverted through the Applicant's headgate.

David Hofer testified that the Applicant is willing to leave the headgate and ditch intact. However, Bob Larson testified that leaving the diversion structure in place may result in a duplication of water diversions, since leaving the structure would result in water going down the old channel while the Applicant would be diverting the full amount at the changed point of diversion. Mr. Larson emphasized that the Applicant's present structure could not be used or allowed to divert waters while the Applicant is diverting downstream at the proposed point of diversion, except when such simultaneous diversion occurs naturally through the presence of flood waters that bypass the Applicant's present headgate structure.

Marvin Cross testified that the diversion structure will divert water into the old ditch during periods of high flow if the structure is left in place, but that normal flow in the creek would not be diverted.

19. The proposed enlarged Blair Reservoir would capture all the water coming down Eagle Creek above the proposed point of diversion in a low flow year, but the current Blair Reservoir would stop it anyway in a normal year. (Testimony of Marvin Cross.)

Mr. Cross stated that the proposed change could alter the flow rate of the Applicant's diversion, since the larger reservoir would capture the entire flow of the creek until the entire 207 acre-feet capacity is full, whereas under the present system, once Blair reservoir has filled to its capacity of 80 acre-feet, the Applicant's diversion would be limited to the capacity of the ditch leading to Bourne-Hamilton (see Finding of Fact 6): any flows in excess of 20 cfs could not have been diverted and would have spilled at Blair, becoming available to downstream users (assuming, of course, that Blair was not drawn down by diversions for irrigation).

Since no reliable flow data is available for the record (see Finding of Fact 15), it is not possible to tell if, or how often, the flow in Eagle Creek exceeds 20 cfs.

20. Flow measuring devices would be difficult and expensive to install, but storage capacity of the proposed reservoir could be determined by thoroughly surveying the reservoir site.

(Testimony of Marvin Cross.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant, substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. MCA § 85-2-402 (1985) states that the Department shall approve a proposed change if it determines that the appropriator has proved by substantial credible evidence that the following criteria are met:

- (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
- (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.
- (c) The proposed use of water is a beneficial use.

4. The proposed uses of water, irrigation and stockwatering, are beneficial uses. See MCA 85-2-102(2) (1985); Sayre v. Johnson, 33 Mont. 15, 18 P. 389 (1905).

5. The record in this matter indicates that the proposed use will not adversely affect any planned uses or developments for which a permit has been issued or for which water has been reserved. (See Finding of Fact 4.)

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 7 and 8; Statement of the Case regarding review for dam safety.

7. The Applicant has provided substantial credible evidence that the proposed change in storage will not adversely affect the water rights of other persons.

Many of the allegations of potential adverse effect which the Objectors in this matter expressed are based on concerns with the amount of the Applicant's claimed water use rights. The objections filed to the Application contain allegations that the Applicant's volume is excessive (Pioneer Farms, Gerald Fenger Farms, Violet Farms), and that the Applicant is claiming too much water both in terms of flow and volume (Raymond and Lillian Fritz, Errol Fritz, Leonard Fritz, Nellie Diemert).

However, apart from Errol Fritz's hypothesis that the Applicant's claimed use rights must be based on "high water" (see Finding of Fact 16), the Objectors did not provide any testimony or evidence which refutes the Applicant's entitlement to the claimed flow rate and volume. (Indeed, a review of Department records indicate that none of the Objectors filed an objection to the Applicant's claimed use rights in the adjudication process, even though at least two of the Objectors (Leonard Fritz and Raymond Fritz) took advantage of the adjudication objection

process to file objections to other claims. Accordingly, the preliminary adjudication decree has recognized the Applicant's use rights as claimed.)

The Objectors cannot defeat the proposed change merely by making general allegations that the Applicant is not entitled to the claimed rights. The Applicant has provided prima facie proof of its entitlement to the water use rights involved in the present Application for Change,<sup>1</sup> and the Objectors have not provided any evidence to contradict that proof. Therefore, the Applicant has met its burden of production on the existence of the water rights which are the subject of the change application:<sup>2</sup> the determination on the issue of adverse effect to the water rights of other persons is made on the basis of whether exercise of the Applicant's claimed rights pursuant to the proposed change will result in adverse effect, not whether exercise of the Applicant's claimed rights itself will adversely affect the Objectors.

<sup>1</sup> For a discussion of the necessity of having an Applicant make a threshold showing of the existence of the water rights which he proposes to change, see In the Matter of the Application for Beneficial Water Use Permits Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates and In the Matter of the Application for Change of Appropriation Water Right Nos. 26719-c76LJ and 26720-c76LJ by Meadow Lake Country Club Estates (Final Order, October 6, 1981) August 25, 1981 Proposal for Decision; and In the Matter of the Application for Beneficial Water Use Permit No. 20726-s41H by the City of Bozeman and In the Matter of Application to Sever and Sell Appropriation Water Right No. 20737-s41H (Final Order, January 9, 1985).

<sup>2</sup> For a discussion of the burdens of proof on Applicants and Objectors in change proceedings, see In the Matter of Application for Change of Water Right Nos. 36294-c41A through 36301-c41A by Beaverhead Partnership (February 11, 1985 Proposal for Decision), Addendum "A" to March 8, 1984 Interlocutory Order.

The only adverse effect which the Objectors have alleged in regard to the proposed change itself is that an enlargement of the Applicant's on-stream reservoir will result in the capture of the entire flow of Eagle Creek, thereby depriving the Objectors of the water which they appropriate pursuant to their own claimed uses.

The Objectors have filed Statements of Claim for Existing Water Rights, which provide prima facie evidence that the Objectors possess use rights to Eagle Creek water. However, Objectors' burden of production is not discharged by merely reciting their claimed rights. Objectors must, in addition, produce some evidence causally connecting the proposed change to the alleged adverse effect; here, a reduction in the amount of water available to Objectors. See In the Matter of Application for Beneficial Water Use Permits Nos. 55834-s76LJ and 56386-s76LJ by Zon G. and Martha M. Lloyd (Proposal for Decision, January 22, 1987.)

Assuming arguendo that it is sufficient, in order to produce some evidence of a connection between the proposed use and the alleged adverse effect, for the Objectors merely to show that their water rights are established in the same drainage basin, the burden shifts to the Applicant to prove by substantial credible evidence that there is in reality no connection or that, even if there is a connection, there is no adverse effect. Here, the Applicant provided substantial credible evidence showing that water does not normally make it past Blair Reservoir, except in times of high spring runoff (see Findings of Fact 6, 12), and

that the water in Eagle Creek which normally is available to the Objectors actually originates below the reservoir.<sup>3</sup>

The Objectors did not present any evidence or testimony for the record which indicates that any of the Eagle Creek water which is available to the Objectors originates above Blair Reservoir and makes it past the reservoir (e.g., has never been appropriated by the Applicant). Thus, the weight of the evidence shows that water originating above Blair Reservoir historically has not reached Objectors, except during spring runoff (and presumably, during other very high flow conditions), and that therefore, except during periods of high runoff, the Applicant's proposed change can have no effect on the water availability to Objectors.

8. Although evidence in the record shows that the flow of Eagle Creek upstream from Blair Reservoir does not normally make it downstream past the reservoir, Applicant's own testimony indicates that Blair Reservoir spills during spring runoff, at

<sup>3</sup> See Findings of Fact 12 and 13, and Applicant's Exhibit 2. The testimony and evidence presented by Wayne Otto indicates that a relatively small portion of the Eagle Creek drainage basin is located above Blair Reservoir. Since the entire drainage area appears to receive a uniform amount of precipitation, Mr. Otto's expert opinion that Eagle Creek gains most of its flow below Blair Reservoir appears well-founded.

The Objectors did not question the origin of the runoff, but raised the question of whether runoff patterns below and above Blair Reservoir might differ due to topography and ground cover. In view of the fact that only spring runoff apparently has a chance of reaching the Objectors, the only time runoff above Blair could affect the Objectors is the spring runoff pattern. However, if the Objectors are protected by a permit condition ensuring that the same availability of runoff waters will be maintained (that is, they will receive under the proposed change in the same amounts and at the same times that they would receive it under the present system), their rights will not be adversely affected.

least in some years. (The only testimony on the issue was the Applicant's testimony that the reservoir had spilled in March, 1986. All of the parties were in agreement that 1986 had an unusually high runoff. See Finding of Fact 15.) The Applicant failed to prove that such waters have not been available historically for use by the Objectors.

It is likely that spring runoff below the reservoir is large enough to satisfy the Objectors' stockwater and domestic uses. However, Department records show that several Objectors utilize reservoirs as a means of storage. Although the hearing record does not indicate whether the amounts and timing of any spills at Blair Reservoir are such that they can be utilized to fill the Objectors' reservoirs, the question raises the possibility of adverse effect to the Objectors' water rights if the spring spills at Blair were to be terminated. The Applicant did not address this issue, and has failed to meet its burden of persuasion. Therefore, it is necessary to condition any Permit issued in this matter to ensure that the historic pattern of water use is continued.

Testimony shows that, under Applicant's present diversion and storage system, Applicant's flow rate is limited to whatever amount is captured by Blair Reservoir, plus a maximum of 20 cfs through the ditch leading to Bourne-Hamilton Reservoir. (See Findings of Fact 6, 19.) Once the 80 acre-feet storage capacity of Blair Reservoir is filled, diversion is limited to the 20 cfs diversion to Bourne-Hamilton, plus the capture by Blair Reservoir of enough water to maintain full storage capacity. If irrigation

is occurring, the amount of such capture will be equal to the amount of water being drawn from the reservoir for irrigation (plus some unknown quantity to account for evaporation). Any flow beyond these diversions will spill over Blair Reservoir.

To maintain this historical pattern of diversion, it is necessary to limit the Applicant's diversion to 20 cfs plus irrigation flow, once the capacity of the current Blair Reservoir is filled. Therefore, the Applicant will be required, once 80 acre-feet of storage has been achieved, to limit its diversion to 20 cfs plus whatever flow amount it is drawing from the reservoir for irrigation.

Since the Applicant's testimony indicates that a spillway will be installed at the level where Blair Reservoir presently spills, this requirement will not entail any reworking of the Applicant's stated plans. (See Finding of Fact 8.) However, the Applicant will be required to design the spillway in such a manner that flow-through can be adjusted, and will be required to monitor the flow into the reservoir in order to be able to make the necessary adjustments.

9. There is conflicting testimony regarding the question of whether the existing headgate structure should be left in place. (See Finding of Fact 18.) Apparently the headgate structure may provide some measure of flood control, presumably by breaking the momentum of the creek flow. However, the structure cannot be allowed to remain in place if it will result in water being diverted down the ditch which the Applicant proposes to abandon.

The logical solution to this problem is to have the Applicant render the diversion (headgate structure and ditch) unuseable, while leaving the headgate structure in place. This could be accomplished by filling in the diversion ditch so that flood waters can go around the headgate but not into the ditch. The flashboards should also be removed from the headgate structure.

The Applicant should have a qualified professional (perhaps the Soil Conservation Service or dam construction personnel) review the structure during high flow to determine if leaving the headgate structure in place will result in water being diverted into the ditch and thereby lost to Eagle Creek. If such a review indicates that the existence of the structure results in loss of water to Eagle Creek, the structure should be removed entirely.

Therefore, based upon the Findings of Fact and proposed Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right No. G113493-41N is hereby granted to Eagle Creek Colony to change the point of diversion, place of storage, and means of diversion for Claimed Water Right Nos. W113493-41N, W113496-41N, W113497-41N, W113498-41N, W113499-41N, W113500-41N, W113501-41N, W113502-41N, W113503-41N, W113505-41N, W113508-41N, W113509-41N, and W113510-41N for a total of 77.02 cfs up to 1,815 acre-feet of water per year, to be used by the

Applicant for flood irrigation. The place of use for Claimed Water Right No. W113493-41N, for stockwater, also will be changed from Section 11 to Section 16 of Township 34 North, Range 04 East. All legal descriptions in this matter are located in Liberty County, Montana.

The specific changes which are authorized by grant of this Application are as follows:

The Applicant is authorized to abandon its headgate structure and point of diversion in Section 9, Township 35 North, Range 04 East, and to instead collect water in an onstream reservoir located in the N $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 16, Township 34 North, Range 04 East. The Applicant will abandon its diversion ditch leading from the past point of diversion to Bourne-Hamilton Reservoir, located in Section 11, Township 34 North, Range 04 East, and abandon its right to store water in Bourne-Hamilton Reservoir.

The Applicant is authorized to enlarge its onstream Reservoir, known as Blair Reservoir or Blair Dam, to a total capacity of 207 acre-feet. In addition, the Applicant is authorized to maintain a 5 acre-foot reservoir in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 16, Township 34 North, Range 04 East. This Change Authorization in no event authorizes the Applicant to divert water at a greater rate than 77.02 cfs, or to conjunctively store and use more than 1815.00 ac/A. of water per year.

This Authorization to Change is issued subject to the following express terms, conditions, restrictions, and limitations:

A. The Applicant's claimed water rights, and the changes authorized herein in the use of such rights, are subject to all prior and existing rights and to any final determinations of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Applicant to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Applicant's liability for damages caused by exercise of this Authorization, nor does the Department, in issuing this Authorization, acknowledge any liability for damages caused by the exercise of this Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. The Applicant may leave the headgate structure located in Section 9, Township 35 North, Range 04 East in place until a determination has been made concerning whether or not the structure is useful in Eagle Creek flood control, but the flashboards must be removed and the diversion otherwise rendered inoperable for purposes of allowing water into the ditch. If a determination is made that the structure is resulting in water being diverted into the ditch, the Applicant must remove the headgate structure by the completion date granted for completion of the Applicant's change.

D. The Applicant shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Applicant's claimed uses.

E. The dam structure, spillways and other necessary appurtenances, and all construction necessary to accomplish the installation and maintenance of the Applicant's storage facility

shall be in accordance with Soil Conservation Service plans and specifications, or plans and specifications prepared by a qualified professional engineer and approved by any necessary authorizing agency.

F. The Applicant shall include an outlet in the dam structure at the water level which corresponds to 80 ac/ft. of storage, as determined by topographic studies of the dam site. The outlet shall be designed to allow the Applicant to adjust the amount of water going through the dam, and to measure such pass-through amount.

G. The additional on-stream storage authorized by the present Change procedure must be captured at a flow rate which does not exceed the historical diversion rate. Therefore, once 80 acre-feet of storage has been achieved, the Applicant may not divert at a flow rate greater than the sum of 20 cfs plus the amount of water concurrently being withdrawn from the reservoir for irrigation, or 77.02 cfs, whichever flow rate is less. To achieve this situation, the Applicant must keep track of the streamflow entering the reservoir and the flow rate of water diverted from the reservoir. Whenever the incoming flow exceeds the irrigation flow by more than 20 cfs, the flow in excess of 20 cfs must be released through the dam for use by downstream appropriators.

H. In order to ensure accurate flow measurements, the Applicant must measure the flow of Eagle Creek above Blair Reservoir by using a Parshall flume or other SCS-approved measuring device, or by installing and maintaining a staff gage in accordance with the instructions listed in Addendum A to this Proposal for Decision.

I. The Applicant shall keep flow measurement records, and submit them to the Department of Natural Resources and Conservation's Havre Field Office, yearly by November 30, or upon request.

DONE this 11<sup>th</sup> day of February, 1987.

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed Authorization to Change, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

Addendum A to Authorization to Change Appropriation Water Right No. 113493-41N

- 1. Staff gage shall be set in Eagle Creek in a straight, uniform reach (section) of the channel above Blair Reservoir (T34N, R3E, Section 9). The staff gage shall be graduated in feet, tenths of feet and hundredths of feet. The gage shall be placed so that it is accessible as is practicable.

The Department shall be notified of any movement, replacement, or adjustment of the staff gage. Notification shall include the date and type of modification, and the new location of the staff gage in relation to the bench mark.

2. A permanent bench mark shall be placed near the staff gage, but out of the way of floods, headgates, or roads so that the bench mark will not be disturbed. The level of the staff gage shall be referenced to the bench mark at least once per year or at any time when the staff gage is moved or disturbed.
3. The stream discharge (flow measurement) shall be measured by an adequate measuring device (current meter, weir, Parshall flume, or broad crested weir) at least four (4) times per year. One of the measurements shall be made as near to the peak discharge as is practical. The lowest measured discharge shall be less than one-quarter ( $\frac{1}{4}$ ) of the highest measured discharge. To the extent possible, the additional measured discharges shall be taken at equal intervals between the highest and lowest discharge. The staff gage reading shall be recorded whenever stream flow measurement is made.
4. Staff gage readings shall be made weekly throughout the irrigation season. The gage readings, along with the date and time of reading, shall be recorded.
5. The following documents covering flow and staff gage readings and placement for the previous April 1 to October 4 period shall be submitted to the Department by November 30 of each year.

- A. The staff gage readings to the nearest hundredth of a foot, and the date the reading was made.
- B. The field notes from the discharge measurements, including any worksheets or calculation forms. The field notes should include at least the following:

- (1) The method of measurement.
- (2) The location where the measurement was made.
- (3) The flow rate measured.
- (4) The time and date of the measurement.
- (5) The staff gage measurement at the time of measurement.

The Applicant may obtain help in the placement or reading of the staff gage, methods of measuring flows, and record keeping, from the Department of Natural Resources and Conservation, Havre Field Office, or the Soil Conservation Service.

AFFIDAVIT OF SERVICE  
MAILING

STATE OF MONTANA )  
 ) ss.  
County of Lewis & Clark )

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on February 11, 1987, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision by the Department on the Application for Change of Appropriation Water Right No. G113493 by Eagle Creek Colony, addressed to each of the following persons or agencies:

Eagle Creek Colony  
Rural Route  
Galata, MT 59444

Gummer Farms, Inc.  
Box 524  
Chester, MT 59522

Rae V. Kalbfleisch  
Nelson & Kalbfleisch  
P.O. Box 518  
Shelby, MT 59474-0518

Leonard Fritz  
Box N  
Chester, MT 59522

Nellie Diemert  
Clark E. Diemert Estate  
1712 Alder Dr.  
Great Falls, MT 59474

Errol Fritz, Pres.  
Errol Fritz Farm & Ranch Co.  
Box N  
Chester, MT 59522

Hugh B. Brown, Attorney  
P.O. Box C  
Chester, MT 59522

Raymond & Lillian D. Fritz  
Box 280  
Chester, MT 59522

Gerald Fenger Farms, Inc.  
R.R. Box 7  
Galata, MT 59444

Mary E. & John R. Fritz  
Box 280  
Chester, MT 59522

Violett Farms, Inc.  
Box 104  
Lothair, MT 59461

Bob Larson  
Water Rights Bureau  
Field Office Manager  
Havre, MT  
(inter-departmental mail)

Pioneer Farms, Inc.  
P.O. Box 187  
Chester, MT 59522

Gary Fritz, Administrator  
Water Resources Division  
(hand-deliver)

Gregory J. Hatley, Attorney  
P.O. Box 2103  
Great Falls, MT 59403

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

CASE # 113493

STATE OF MONTANA )  
 ) ss.  
County of Lewis & Clark )

On this 11<sup>th</sup> day of February, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Notary Public for the State of Montana  
Residing at HELENA, Montana  
My Commission expires 1-21-1990